Office-Supreme Court, U.S.
FILED
JAN 21 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-986

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROMOLO E. CAPOBIANCO, ET AL.,
PETITIONER,

v.

RICHARD HOWE, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT, RICHARD HOWE'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PHILLIP M. DAVIS*
JEAN M. KELLEY
KEVIN T. CREEDON
MORRISON, MAHONEY & MILLER
55 Court Street
Boston, MA 02108
(617) 523-7580
Attorneys for Richard Howe

* Attorney of Record

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

Questions Presented

1. Does a private attorney act under color of state law within the meaning of 42 U.S.C. § 1983 where he is engaged in a civil action in a state court?

2. Does a claim of dissatisfaction with the outcome of a state court civil action state a cause of action cognizable in federal court under 42 U.S.C. § 1983?

TABLE OF CONTENTS

	Page
Questions Presented	I
Table of Authorities	IV
Opinions of the Courts Below	1
Jurisdictional Grounds	2
Relevant Statutory Provisions	2
Statement of the Case	4
Summary of Argument	6
Argument	6
The Petitioner Has Failed To Show That There Are Special And Important Reasons For Granting The Petition For A Writ Of Certiorari	6
A. Introduction	6
B. The United States Court of Appeals for the First Circuit Correctly Ruled That the Respondent, Richard Howe, Did Not Act Under Color of State Law Where He Was Engaged as an Attorney in a Civil Action in State Court	7
C. The United States Court of Appeals for the First Circuit Correctly Ruled That the Petitioner's Claim of Dissatisfaction With the Outcome of the State Court Action Did Not Present a Federal Question	8
Conclusion	9
APPENDIX	10
1. Docket Sheet—Romolo E. Capobianco, et al. v. Richard Howe, et al., U.S.D.C. C.A. No. 82-3398-T (D. Mass.)	A-2
2. Complaint	A-4
3. Order on Plaintiff's Motion for Appointment of Counsel, etc. (Alexander, U.S.M. Aug. 22, 1983)	A-7
4. Order (Tauro, D.J., Oct. 13, 1983)	A-9

APPENDIX

5. Opinion—United States Court of Appeals for the First Circuit No. 83-1784 (June 7, 1984) (per curiam) A-10
6. Order (1st Cir. July 31, 1984) A-13

TABLE OF AUTHORITIES

Cases

Briley v. *California*, 564 F.2d 849 (9th Cir. 1977) 8
Briscoe v. *Lahue*, 103 S. Ct. 1108 (1983) 8
Diffenbach v. *Buckley*, 464 F. Supp. 670 (D. N.H. 1979) 8
Downing v. *Arnold*, 461 F. Supp. 54 (D. N.H. 1978) 9
Flagg Bros., Inc. v. *Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed.2d 185 (1978) 7
Henderson v. *Fisher*, 631 F.2d 1115 (3d Cir. 1980) 8
Lindley v. *Amoco Production Co.*, 639 F.2d 671 (10th Cir. 1981) 8
NLRB v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 53, 95 L. Ed. 479 (1951) 6
Polk v. *Dodson*, 454 U.S. 312, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1980) 8
Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955) 6
Rooker v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923) 9

Statutes

42 U.S.C. § 1983 ..... I, 2, 5, 6, 7, 8, 9
28 U.S.C. § 1254(1) 2
§ 1331 3
§ 1343(a)(3) 3

Rules

Federal Rule of Civil Procedure 12(b)(1) 5
12(b)(6) 5
Supreme Court Rule 17.1 ..... 6, 7, 8, 9
33.1 2

In the
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-986

ROMOLO E. CAPOBIANCO, ET AL.,
PETITIONERS,

v.

RICHARD HOWE, ET AL.,
RESPONDENTS.

RESPONDENT, RICHARD HOWE'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions of Courts Below

Romolo E. Capobianco, et al. v. *Richard Howe, et al.*, United States District Court of the District of Massachusetts, C.A. No. 82-3398-T (October 13, 1983) (unreported).

Romolo E. Capobianco, et al. v. *Richard Howe, et al.*, United States Court of Appeals for the First Circuit, No. 83-1784 (Per Curiam) (June 7, 1984) (unreported).

Jurisdictional Grounds

The petitioners, Romolo E. Capobianco, et al. ("petitioner"), have petitioned this Court for a Writ of Certiorari to the United States Court of Appeals for the First Circuit to review the decision of that court in the case of *Romolo E. Capobianco, et al.* v. *Richard Howe, et al.*, No. 83-1784, opinion dated June 7, 1984. By order dated July 31, 1984, the First Circuit Court of Appeals denied the petitioner's request for a rehearing. (Appendix to Brief in Opposition to Petition for a Writ of Certiorari ["App."] A-13). On October 5, 1984, Associate Justice William Brennan signed an order extending the petitioner's time in which to file a petition for a writ of certiorari to and including November 28, 1984.

On or about November 28, 1984, the petitioner filed a petition for a writ of certiorari. However, on December 3, 1984, this Court returned the petition as a result of its non-conformance with Supreme Court Rule 33.1. This Court allowed the petitioner twenty-one (21) days in which to cure the non-conformance. On or about December 21, 1984, the petitioner filed a second petition for a writ of certiorari.

The petitioner relies upon 28 U.S.C. § 1254(1), as grounds for jurisdiction in this Court.

Relevant Statutory Provisions

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) The District of Columbia shall be considered to be a State; and

(2) Any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

The petitioner commenced this action *pro se* in November, 1982 naming as defendants, "Judges of State Courts", Attorney Joseph Princi ("Princi") and Attorney Richard Howe ("Howe"). (A-1, 4). The petitioner amended his complaint to name Attorney James Dangora as an additional defendant. (A-2).

A. *Summary of the Complaint.*

In August, 1977, the petitioner executed a lease of real property with William and Donna Connolly (hereinafter, "the Connollys"). The lease provided the Connollys an option to purchase the leased property upon the expiration of one year. (A-4). After one year had expired, the Connollys were three months in arrears in their rent and had not exercised their option to purchase the property. (A-4). Eighteen (18) months later, the Connollys informed the petitioner that they wished to purchase the property. (A-4). Represented by Howe, the Connollys commenced an action in Massachusetts Superior Court for Middlesex County alleging breach of contract. (A-5). The case resulted in a judgment for the Connollys, and Princi, the petitioner's attorney, filed an appeal on behalf of the petitioner. (A-5).

When the petitioner refused to convey the property as required under the order of specific performance, Howe, on behalf of the Connollys, moved the court to hold the petitioner in contempt. (A-5). The petitioner requested a continuance and an opportunity to be represented by counsel. (A-5). Both requests were denied by the court. (A-5). The court ordered the petitioner to tender the deed subject to the penalty of being placed in jail for refusal to do so. (A-5). The petitioner discovered that Princi had withdrawn the appeal without his knowledge. (A-5). The petitioner, under duress, signed the deed. (A-5).

In his prayer for relief, the petitioner requested that the court conduct a hearing to bring forth all the facts, to reprimand Judge Donahue (Massachusetts Superior Court, Associate Justice), Attorneys Princi, Howe, and Dangora, and for such other relief as the court deems appropriate. (A-5-6).

B. *Summary of Dismissal and Appeal.*

Howe moved the court to dismiss the action for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), and for failure to state a claim for which relief could be granted, Fed. R. Civ. P. 12(b)(6). (A-2). Dangora and Princi likewise moved to dismiss the action. (A-2). The motions were referred to United States Magistrate Alexander for a report and recommendation. (A-2). With respect to the claim asserted against the "judges of state courts", the Magistrate ruled that judicial officers enjoy absolute immunity from suit. (A-8). With respect to the claims against Princi, Dangora and Howe, the Magistrate ruled that the petitioner's claims of dissatisfaction with the results of his putative sale of property and with the conduct of his attorney in the state court litigation do not state a cause of action upon which a federal court may exercise jurisdiction. (A-8). The Magistrate recommended that the complaint be dismissed. (A-8).

The District Court, Tauro, D.J., adopted the Magistrate's recommendation, and the complaint was dismissed. (A-9).

Capobianco pursued an appeal of the judgment of the District Court, and the United States Court of Appeals for the First Circuit, in a per curiam opinion dated June 7, 1984, affirmed the judgment of dismissal. (A-10-12). The court held that "[t]he conduct of the attorneys cannot be described as 'state action' and the conduct of the judge does not amount to a deprivation of federally protected rights." (A-11). In addition, the court held that "42 U.S.C. § 1983 was not intended to provide a federal review of state court actions." (App. 11). Finally, the court held that there was no basis for monetary, injunctive or declaratory relief. (A-12). On July 31, 1984, the court denied a petition for rehearing. (A-13).

Summary of Argument

The petitioner has failed to show that there are special and important reasons for granting the petition for a writ of certiorari. The United States Court of Appeals for the First Circuit correctly held that the conduct of an attorney engaged in a civil action in state court does not constitute "state action" within the meaning of 42 U.S.C. § 1983. Furthermore, the court correctly ruled that 42 U.S.C. § 1983 does not provide a vehicle for federal review of state court civil actions.

There is no question of law at issue that justifies the grant of a writ of certiorari here.

Argument

THE PETITIONER HAS FAILED TO SHOW THAT THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI.

A. *Introduction.*

"A review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Supreme Court Rule 17.1. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-75, 75 S. Ct. 614, 616-617, 99 L. Ed. 897 (1955); *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502, 71 S. Ct. 453, 456, 95 L. Ed. 479 (1951). Certiorari is granted only in cases involving issues of importance to the public. *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502, 71 S. Ct. 453, 456, 95 L. Ed. 479 (1951).

Supreme Court Rule 17.1 sets forth the following criteria to be used by this Court in ruling on a petition for a writ of certiorari:

(1) where a federal court of appeals has decided a federal question in a manner which conflicts with the decision of another circuit court of appeals;

(2) where a federal court of appeals has decided a federal question in conflict with a state court of last resort;
(3) where a federal court of appeals has decided an "important question of federal law" which has not been but should be decided by the United States Supreme Court;
(4) where a federal court of appeals has decided a federal question in a manner that conflicts with applicable decisions of the United States Supreme Court; or
(5) where a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power.

Supreme Court Rule 17.1(a), (c). The petitioner has failed to satisfy any of these criteria.

B. *The United States Court of Appeals for the First Circuit Correctly Ruled That the Respondent, Richard Howe, Did Not Act Under Color of State Law Where He Was Engaged as an Attorney in a Civil Action in State Court.*

The petitioner alleges that Howe deprived the petitioner of his civil rights and due process of law rights. Specifically, the petitioner points to Howe's conduct as the attorney for the Connollys in the state court action. The complaint alleges that after obtaining a judgment against the petitioner in state court, Howe moved the court to hold the petitioner in contempt of court for his failure to comply with the order of specific performance. Furthermore, the petitioner alleges that he complied with the order of specific performance under duress.

In order to state a claim under 42 U.S.C. § 1983, the complaint must allege that the plaintiff was deprived of a right secured to him under the Constitution or federal law, and that such deprivation occurred "under color of state law." *Flagg*

Bros., Inc. v. *Brooks*, 436 U.S. 149, 155-156, 98 S. Ct. 1729, 1733, 56 L. Ed.2d 185, 189 (1978). It is universally held, however, that a private attorney engaged as counsel in a civil action does not act "under color of state law" within the meaning of 42 U.S.C. § 1983. E.g., *Lindley* v. *Amoco Production Co.*, 639 F.2d 671, 673 (10th Cir. 1981); *Henderson* v. *Fisher*, 631 F.2d 1115, 1119 (3d Cir. 1980); *Briley* v. *California*, 564 F.2d 849, 855 (9th Cir. 1977); *Diffenbach* v. *Buckley*, 464 F. Supp. 670, 675 (D. N.H. 1979); see also *Briscoe* v. *Lahue*, 103 S. Ct. 1108, 1112-1113 n. 6 (1983); *Polk* v. *Dodson*, 454 U.S. 312, 324-325, 102 S. Ct. 445, 453, 70 L. Ed. 509 (1981).

Inasmuch as the petitioner predicates his claim against Howe upon Howe's conduct as counsel for the Connollys in the state court civil action, it is clear that the "state action" requirement of 42 U.S.C. § 1983 was not satisfied. The United States Court of Appeals for the First Circuit so held.

The petitioner has not shown that the First Circuit's decision conflicted with a decision of another circuit or of this Court. See Supreme Court Rule 17.1(a), (c). Moreover, the petitioner has not shown that the First Circuit decided an issue of federal law which merits resolution by this Court. See Supreme Court Rule 17.1(c). Finally, the petitioner has not shown that the First Circuit's decision was inconsistent with the accepted and usual course of judicial proceedings. See Supreme Court Rule 17.1(a). This case does not warrant the issuance of a writ of certiorari.

C. *The United States Court of Appeals for the First Circuit Correctly Ruled That the Petitioner's Claim of Dissatisfaction With the Outcome of the State Court Action Did Not Present a Federal Question.*

The petitioner also claims that he is dissatisfied with the outcome of the state court civil action. The First Circuit Court of Appeals held that this claim of dissatisfaction did not amount to a deprivation of federal rights. (A-11). Moreover, the

First Circuit Court of Appeals correctly held that 42 U.S.C. § 1983 was not intended to provide a vehicle for federal review of state court civil litigation. (App. 11). *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415-417, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). *Downing* v. *Arnold*, 461 F. Supp. 54, 57 (D. N.H. 1978). The First Circuit Court of Appeals correctly affirmed the judgment of dismissal.

The petitioner has failed to show that this case falls within any of the criteria delineated by Supreme Court Rule 17.1. In summary, the petitioner has failed to show that this case presents a question worthy of review by this Court.

Conclusion

It is respectfully submitted that the petitioner has failed to show that there are special and important reasons for granting the petition for a writ of certiorari. The decision of the First Circuit Court of Appeals did not involve a substantial question of federal law; nor has the Court of Appeals decided a federal question in a way which conflicts with applicable decisions of this Court or of another Circuit Court of Appeals. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD HOWE,

By his attorneys,

PHILLIP M. DAVIS
JEAN M. KELLEY
KEVIN T. CREEDON
MORRISON, MAHONEY & MILLER
55 Court Street
Boston, MA 02108
(617) 523-7580

Appendix 1

ON APPEAL

VOL. 1 82 3398 11 8 2 3 440 1 NEAREST $1,000 J0115 25017 82-3398

PLAINTIFFS
ROMOLO E. CAPOBIANCO, INC.
ROMOLO E. CAPOBIANCO,

DEFENDANTS
JUDGES OF STATE COURT
ATTORNEY JOSEPH PRINCI and
ATTORNEY RICHARD HOWE
JAMES DANGORA (added 4/18/83)

CAUSE
(Cite the U.S. Civil Statute Under Which the Case Is Filed and Write a Brief Statement of Cause)

CIVIL RIGHTS CLOSED 10-13-83

ATTORNEYS

ROMOLO E. CAPOBIANCO.
Pro Se
29 Andover Rd.
Billerica, MA 01821

JAMES DANGORA
RAYMOND J. KENNEY, JR.
73 Tremont Street
Boston, MA 02108
227-3240

RICHARD HOWE
MORRISON, MAHONEY & MILLER
55 Court St.
Boston, MA, 02108
523-7580

CIVIL DOCKET ENTRIES
(DOCKET NO. 82-3398)

1982			
Nov.	8	01	Complaint filed.
1983			
Apr	4	02	Mtn for attachment of property in Tynsboro, MA, filed.
	4	03	P's mtn to amend complaint, filed. (c/s)
	4	04	Mtn for appt of cl by court for pltf, filed.
	18		TAURO, D.J. — re: #03, MTN ALLOWED. By the court, Mary L. Coughlin, D. Clerk. (cc/cl)
May	6	05	Ret of service wso by certified mail, filed.
	23	06	Mtn of deft, atty James Dangora, Jr., to dismiss, filed. (c/s)
	23	07	Memo of deft, Atty James Dangora, Jr., filed. (c/s)
	26	08	Pltf's objection to mtn to dismiss, filed.
June	2		ORDER OF REFERENCE TO MACISTRATE: #02, 04 and recommendation on #06 w/opposition #08. File referred to Magistrate Alexander.
	8	09	Mtn of D, Howe, to entend time whithin which to file responsive pleading and ans to P's complaint, filed. c/s
	10	10	Mtn of deft, Atty Joseph Princi, to dismiss, filed. (c/s)
	15		File referred to USM ALEXANDER re: #10 for REPORT & RECOMMENDATION.
	22	10	Objection to mtn to dismiss, filed.
Jul	1		TAURO, D.J. — re: #09, ALLOWED. By the court, Mary L. Coughlin, D. Clerk. (cc/cl)
	5	11	D's mtn to dismiss p';s complaint as it pertains to him & for entray of judgment, filed. (c/s)
	5	12	Brief in support of deft, mtn to dismiss p's complaint, filed. (c/s)

1983		
11		File referred to USM ALEXANDER, RE: #11 memo in support of #12.
18	12	Document by pltf, filed.
Aug. 8	13	P's mtn Romolo E. Capobianco to ext time w/in which to file responsive pldg &/or ans to d's mtn to dismiss p's amended & to enter judgment, filed. (c/s)
22	14	ALEXANDER, USM — ORDER, RE: #02, & 04, DENIED. FINDINGS & RECOMMENDATION RE: #11, Recommended it be allowed. ENTERED 8/22/83.
23		ALEXANDER, USM — re: #13, In light of my Order & Findings & Recommendation of 8/22/83, the mtn is hereby denied.
26	15	Notice of appeal, filed. (c/s)
Oct. 13	16	TAURO, D.J. — ORDER, ENTERED 10/13/83... RE: recommendation, adopted (cc/cl)
24	17	Notice of Appeal filed. cc/cl (FF Pd.)
Nov. 3		certified copy of docket & original pleadings forwarded to court of appeals.
9	18	Letter to clerk, dated 11/8/83, from Jean M. Kelley, appearance for d's, by Richard Howe, filed.

Appendix 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.

ROMOLO E. CAPOBIANCO, INC.
ROMOLO E. CAPOBIANCO,
Both of Billerica, Massachusetts
PLAINTIFFS

v.

JUDGES OF STATE COURT
ATTORNEY JOSEPH PRINCI
ATTORNEY RICHARD HOWE

(Attorney Joseph Princi — Lecomte, Shea, Dangora and Barber)
(Attorney Richard Howe — Attorney — Lowell, MA)

COMPLAINT

I, Romolo E. Capobianco, come before you because I believe my civil rights, as well as, due process of the law has been denied. In addition, I also hold Joseph Princi, attorney, and Richard Howe, attorney and the State Courts responsible for my misrepresentation.

1. In August of 1977, I entered in an agreement with William and Donna Connolly of Tyngsboro, in which they signed a lease with an option to to buy with myself as Seller. After one year of leasing they had the option to buy the house if they desired and agreed to.
2. After one year they were *behind 3 months rent* and *did not come forward.*
3. After eighteen months they called and expressed a desire to purchase the above property. *I agreed with the stipulation that an appraisal of the the property be done.*

4. They in turn, brought court action against myself to sell under the original terms.
5. It was found in their behalf, but Attorney Joseph Princi *filed an appeal* and the appeal was in effect.
6. The Connollys's filed for contempt and when I went forward and asked for an *continuance or have an attorney present, this was denied.*
7. Finally, on November 5, 1982 with a bench warrant issued, I was forcably taken to Cambridge Court and order by Judge Donahue to sign the deed or go to jail. I tried to present to the Judge certain facts surrounding the case and also that I know of an appeal that was filed on my behalf.
8. The judge would not listen, nor did he allow a continuence or *give me the right to have an attorney present.*
9. It was made known to me that my attorney *had withdrawn my appeal without giving my any verbal or written notice.*
10. I also made known the fact that *my wife because of her entanglement with this litigation and working on my behalf suffered a mental breakdown and placed in a mental hospital. I have charge of three small children and that my business and right to make a living was the sole support for them. The judge refused to listen and under extreme duress and the demand that I be put to jail for 10 days unless signing over the deed, I agreed for fear of myself and my children.*

I, Romolo E. Capobianco, plead with you after reading the above factors with only for:

1. The Federal Court conduct a fair and impartial hearing so that all the important factors be brought forth.
2. That the Judge Donahue and Attorney Joseph Princi and Attorney Richard Howe be reprimanded for their actions.

3. For such other and further releif as the Court deems meet and just on my behalf.

ROMOLO E. CAPOBIANCO, INC.
ROMOLO E. CAPOBIANCO,
both 29 Andover Road
Billerica, MA
(s) ROMOLO E. CAPOBIANCO

Appendix 3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 82-3398-T

ROMOLO E. CAPOBIANCO, INC. and
ROMOLO E. CAPOBIANCO,
Both of Billerica, Massachusetts
PLAINTIFFS

v.

JUDGES OF STATE COURTS,
ATTORNEY JOSEPH PRINCI and
ATTORNEY JAMES DANGORA, JR. and
ATTORNEY RICHARD HOWE
of Lowell, Massachusetts
DEFENDANTS

ORDER ON PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL AND MOTION FOR ATTACHMENT OF PROPERTY AND FINDINGS AND RECOMMENDATIONS ON DEFENDANTS' MOTIONS TO DISMISS

August 22, 1983

ALEXANDER, M.

Plaintiff's complaint, filed November 8, 1982, asserts claims against the judges of the state court and against attorneys Joseph Princi, James Dangora and Richard Howe. Plaintiff's claims arise from his dissatisfaction with the result of a civil lawsuit involving the sale of property. After review of the pleadings and memoranda filed, this Court recommends that the Motions to Dismiss be allowed.

It is well settled that judicial officers enjoy absolute immunity from suit. *Sullivan* v. *Kelleher*, 405 F.2d 486 (1st Cir. 1968). Furthermore, plaintiff's complaint does not allege the deprivation of a constitutionally protected right or interest which would serve as the basis for a claim under federal law. Plaintiff's statements of dissatisfaction with the results of the sale of his property, and his dissatisfaction with his attorney do not assert a cause of action upon which this Court can entertain jurisdiction. See, *Downing* v. *Arnold*, 461 F.Supp. 54 (D. N.H. 1978).

In that this Court recommends that the complaint be dismissed, plaintiff's Motions for Attachment of Property, and for Appointment of Counsel are denied.

(s) JOYCE ALEXANDER
United States Magistrate

Either party may file written objections to these findings and recommendations within ten days of receipt. Failure to file within ten days shall result in waiver of appeal. See *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980).

Appendix 4

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 82-3398-T

ROMOLO E. CAPOBIANCO, et al.
PLAINTIFFS

v.

RICHARD HOWE, et al.
DEFENDANTS.

ORDER
October 13, 1983

TAURO, D.J.

On August 22, 1983, the Magistrate issued a recommendation that the defendants' motions to dismiss be allowed and that the complaint be dismissed. After reviewing the Magistrate's report and recommendation, the objections thereto, and the record in this case, the court has decided to adopt the Magistrate's report and recommendation.[1]

It is so ORDERED.

(s) J. Tauro
United States District Judge

[1] In addition to the Magistrate's discussion, it is worthy of note that the § 1983 action against the attorneys must fail because participation in a state court proceeding does not make the attorneys' actions "under color of state law." *See Diffenbach* v. *Buckley*, 464 F.Supp. 670 (D. N.H. 1979).

Appendix 5

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 83-1784

ROMOLO E. CAPOBIANCO, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

RICHARD HOWE, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOSEPH L. TAURO, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
COFFIN and BREYER, *Circuit Judges*.

Romolo E. Capobianco on brief, *pro se*.
Jean M. Kelley, *Kevin T. Creedon*, and *Morrison, Mahoney & Miller* on brief for Richard Howe.
Raymond J. Kenney, Jr., and *Martin, Magnuson, McCarthy & Kenney* on brief for appellees James Dangora and James Princi.

June 7, 1984

Per Curiam. This appeal is taken from the district court's dismissal of appellant's complaint for failure to state a claim upon which relief could be granted.

The complaint describes appellant's version of a real estate transaction and subsequent state court proceedings. It names two attorneys and unnamed state court judges as defendants.

As to one attorney, the complaint mentions him only in the caption. As to the other attorney it alleges that he filed an appeal in state court on appellant's behalf and later withdrew it without appellant's consent.[1] As to one state judge, the complaint alleges that he required appellant to surrender certain real estate or face contempt of court sanctions and that he did so with knowledge of the dilemma appellant faced and that he denied appellant a continuance and the right to counsel.

Though the complaint does not specifically describe the basis for federal jurisdiction, we assume that it was brought under 42 U.S.C. § 1983. As such it was properly dismissed.

The conduct of the attorneys cannot be described as "state action" and the conduct of the judge does not amount to a deprivation of federally protected rights.

Threatening a party with contempt sanctions for failure to abide by an order of the court is neither illegal nor a deprivation of federal rights. The denial of a continuance and counsel, if improper, were wrongs that could be remedied by an appeal in state court. 42 U.S.C. § 1983 was not intended to provide a federal review of state court actions. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923). The fact that the pursuit of appellate remedies would have placed appellant in a difficult personal dilemma does not constitute a deprivation of federal rights.

---

[1] The complaint was later amended to include a third attorney but the only allegation found in the district court record as to him is a claim that he conspired with the other lawyers to commit fraud. No state action is claimed.

In addition, the sole specific relief requested is a "reprimand" against the defendants. There is no statutory basis for such relief and without such authority the district court could not grant it. Monetary damages would not be available against the judge. See *Stump* v. *Sparkman*, 435 U.S. 369 (1978). Injunctive relief would be unavailing since the state proceedings had long-since concluded. Declaratory relief would involve voiding the state court action and would thus run afoul of *Rooker*.

We agree with the district court that there was no basis for relief and thus affirm its judgment.

Appendix 6

United States Court of Appeals
For the First Circuit

No. 83-1784

ROMOLO E. CAPOBIANCO, ET AL.,

PLAINTIFFS, APPELLANTS,

v.

RICHARD HOWE, ET AL.,

DEFENDANTS, APPELLEES.

Before

CAMPBELL, *Chief Judge*,

COFFIN and BREYER, *Circuit Judges*.

ORDER OF COURT

ENTERED: JULY 31, 1984

The petition for rehearing is denied.

By the Court:

FRANCIS P. SCIGLIANO, *Clerk*.

[cc: Messrs: Capobianco, Kenney and Ms. Kelley]